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IN THE

Supreme Court of the United States

ROBIN JOHAL, PETITIONER

v.

LITTLE LADY FOODS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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I. Petitioner preserved for review the issues (a) of "qualification" as a part of the *prima facie* case and (b) of elimination of position as "pretext".

A. *Qualification.* Little Lady Foods, Inc. ("LLF") is wrong in its assertion that Robin Johal ("Johal") did not raise the issue of qualification in the lower courts. In her memorandum of law presented to the District Court in opposition to the motion for summary judgment of LLF ("DC Memo"), Johal addressed the *prima facie* case using the long established "legitimate expectations" test; however, she raised a broader issue of qualification when she stated on page 1 of the DC Memo, "LLF fired Johal, an Asian, on July 13, 2001. The replacement of a qualified Asian with a qualified Caucasian creates an inference of racial discrimination."

In the Circuit Court Johal responded again to the "legitimate expectations" test utilized in the Seventh Circuit, but then challenged the "legitimate expectations" paradigm. She advanced the second part of the "objective qualifications" test and argued that evidence of performance presented by LLF "should be addressed more appropriately to the articulation of a legitimate, non-discriminatory reason for firing Johal." (Appellant's Brief p. 26). She also quotes from *Gregory v. Daly*, 243 F. 3d 687 (2nd Cir. 2001) at 696-7, "But the crucial point remains the same: the qualification prong, as to which the initial burden lies on plaintiff, cannot be transformed into a requirement that the plaintiff anticipate and disprove an employer's explanation that inadequate ability or performance justified the job action at issue."

B. *Pretext.* LLF is wrong in its assertion that Johal failed to challenge the purported elimination of her position before the lower courts. She stated with respect to elimination of position as pretext on page 12 of the DC Memo:

> On January 1, 2001, the R&D department consisted of Johal as Manager and a technician. At the end of the year the department had become a part of technical services. The Director of Technical Services supervised the R&D, the product development chef prepared samples, and the lead technician continued unchanged. A two-person department had become a two and one half person department. Nothing was eliminated and the department was expanded. The purported elimination of position was not real.

C. *Motion to Strike.* LLF moved to strike portions of Johal's brief in the Seventh Circuit (i) relating to addressing LLF's evidence of performance at the pretext level rather than as part of a prima facie case and (ii) relating to comparisons of the Director of Technical Services position with the Manager of Research and Development position as evidence of pretext on the grounds that the issues had not been raised in the District Court. The Seventh Circuit denied the motion to strike and thus rejected LLF's assertion of waiver. App. p.43a. LLF did not renew those objections in its brief to the Seventh Circuit. The issue of waiver has been addressed, and LLF did not appeal the denial of its motion.

II. This Court should grant certiorari to define the scope of factual review necessary to rebut the existence of pretext and to define the circumstances under which the business judgment rule can be invoked properly to rebut pretext.

LLF is wrong when it asserts that the short and deceptively simple analysis of pretext by the Seventh Circuit raises no issue of importance beyond this case.

A. *Scope of Factual Review.* The Seventh Circuit sets forth the facts relied upon by it to decide pretext in a single

sentence, "It [the record] shows that the company's business demands were growing and changing and that Johal's former responsibilities were distributed among three other positions as part of an overall restructuring of job functions and reporting lines." (Petition pp. 4a-5a). Those were the facts presented by LLF to articulate its legitimate non-discriminatory explanation for firing Johal.

Johal presented two lines of analysis (comparison of the duties of Johal's position of Manager of Research and Development with the duties of the new Director of Technical Services and prior false use of a claimed elimination of position) to establish pretext. Facts in the record and case law cited by Johal supported each line of analysis. The pretext discussion of the Seventh Circuit sets forth neither the arguments of Johal nor the facts and cases which support her arguments.

LLF claims that the sentence in the Seventh Circuit's opinion, "But the record does not support an inference of pretext." (Petition p. 4a), shows by itself that "In so stating, the Seventh Circuit informed Plaintiff that her arguments and evidence had been considered and rejected." (Brief in Opposition p. 15). The sentence must be read along with the sentence following which Johal sets forth above. The meaning of the two sentences becomes clear if the word "because" is inserted between them to read, "But the record does not support an inference of pretext [because] It shows that the company's business demands ..." The two sentences do not address the specific arguments for pretext presented by Johal.

This Court in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d. 207 (1981) established that an employer needs only to articulate a legitimate non-discriminatory reason to rebut a *prima facie* case of unlawful discrimination. If a court properly can rely upon the facts which articulate a legitimate non-discriminatory explanation alone to rebut pretext, without discussion of the arguments, facts, and cases presented by an

employee to establish pretext, then the pretext stage has been effectively eliminated. The Seventh Circuit erred in its failure to address the arguments for pretext presented by Johal, but more importantly it erred in its exclusive reliance upon evidence submitted by LLF to rebut pretext. Implicit in the Seventh Circuit's reliance exclusively upon facts submitted by LLF to rebut pretext is the holding that a reason given as a legitimate non-discriminatory explanation can be sufficiently strong to negate the need to consider the evidence of pretext introduced by the employee. The analysis used by the Seventh Circuit made the arguments submitted by Johal superfluous and in effect is a silent nullification of *McDonnell Douglas v. Green,* 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d. 668 (1973). The sparse analysis of pretext does not immunize the case from review when the unstated underlying governing principle of law used is evident from the opinion.

LLF overstates Johal's position when it characterizes her argument to require the Seventh Circuit to "comment on every argument and piece of evidence offered by Plaintiff in support of her pretext argument." (Brief in Opposition p. 15). Johal contends that analysis of an argument for pretext must be based at least in part upon the facts submitted by her. *McDonnell Douglas v. Green* gives an employee at the pretext stage the right to demonstrate by competent evidence that the presumptively valid reason for an employment practice (discharge) was in fact a coverup for an unlawfully discriminatory decision. The facts identified by the employee are the facts relevant to the existence of pretext. Rule 56 of the Federal Rules of Civil Procedure authorizes the grant of summary judgment if the applicable facts ("pleadings, depositions, answers to interrogatories and admissions on file together with affidavits") show that there is no genuine issue as to any material fact. The interaction between *McDonnell Douglas v. Green* and Rule 56 mandates that the decision to grant summary judgment or affirm the grant of summary judgment on the issue of pretext must be

based at least in part upon the facts which the employee claims demonstrate pretext because the court must determine that those applicable facts do not raise a genuine issue in order to comply with Rule 56.

The Seventh Circuit acknowledged Johal's raising the argument that a genuine issue of material fact existed about whether LLF had eliminated her position as Manager of Research and Development. The Seventh Circuit purported to address the issue in full; however, in its response to the argument it looked only to LLF's growth and the dispersion of research and development responsibilities after Johal's discharge. It did not consider LLF's actions prior to Johal's discharge in creating the new position of Director of Technical Services which had overlapping R&D management responsibilities with Johal's position as Manager of Research and Development. (Petition pp.4a-5a).

It is insufficient for a court only (1) to identify the presumptively valid reason for the employment action, (2) to state generally that the employee disputes the accuracy of the presumptively valid reason, and (3) to conclude based either upon its general overview of the record or upon the facts submitted by the employer that the presumptively valid reason is not pretext. The evidence produced by the employer to show a legitimate non-discriminatory reason for its action cannot by itself rebut pretext when the employee has presented other competent evidence to demonstrate pretext. The analysis of pretext must include the evidence presented by the employee and not just the evidence introduced by the employer.

The arguments for pretext that Johal submitted were not frivolous. The District Court (App. pp. 15a-16a) and the parties acknowledge the similarities between the job descriptions for the Director of Technical Services and for the Manager of Research and Development. LLF explains the similarities by asserting that the Director of Technical Services supervises the Manager of Research and Development (Brief in Opposition p. 24). An alternate and

reasonable inference is that upon creation of the position of Director of Technical Services LLF intended for the new director to perform all the duties and responsibilities specified and to replace Johal.

This Court should grant certiorari to consider whether the interaction between *McDonnell Douglas v. Green* and Rule 56 of the Federal Rules of Civil Procedure requires analysis of the specific facts identified by the employee to demonstrate pretext before granting or affirming the grant of summary judgment with respect to pretext. Enunciation of such a requirement will provide assurance that evidence of pretext is fully and adequately reviewed at the summary judgment stage and increases the likelihood that the goals of Title VII will be achieved. The proper steps to address pretext are (1) to set out the appropriate standard for review, (2) to identify the pretext issues presented, and (3) to assess the validity of the issues presented. The Seventh Circuit did not do that.

B. *Business Judgment Rule.* The only standard for assessing pretext in the single paragraph, which addresses pretext in the opinion of the Seventh Circuit, is that the role of the court is not to "question the wisdom of a company's decision on how to run its business." (Petition p. 5a). The Seventh Circuit uses the business judgment rule in a situation where a business choice does not govern.

LLF's legitimate non-discriminatory explanation for the firing of Johal was that it had eliminated her position. A decision to eliminate Johal's position would be a business decision. The fact that a business decision preceded and lead to LLF's articulated legitimate non-discriminatory explanation for discharge would have no impact on the validity of any argument for pretext that Johal presented. The applicability of the business judgment rule arises after presentation of an argument for pretext and then would be based upon the nature of the argument presented.

Contrary to LLF's assertion (Brief in Opposition pp. 20-21) the Seventh Circuit did not properly use the business judgment rule. The essence of the business judgment rule is that facts presented to establish pretext do not warrant an inference of discriminatory intent when those facts can be explained as the exercise of honest business judgment. See *Paluck v. Gooding Rubber Company*, 221 F. 3d 1003 (7th Cir. 2000) at 1013 (Layoffs justified by a loss of business), *Lesch v. Crown Cork & Seal Co.*, 282 F. 3d. 467 (7th Cir. 2002) at 73-4 (Selection of one accountant over another for a new position after the phase out of a division), and *Kariotis v. Navistar Int'l Transp. Corp*, 131 F. 3d 672 (7th Cir. 1997) at 677-8 (Honest belief in inaccurate information which if true would have warranted action taken). These cases represent the broad categories where courts apply the business judgment rule: (1) reorganizations and reductions in force, (2) selection of particular individuals, and (3) reliance upon incorrect information. Each of the foregoing cases only turned to the business judgment doctrine after a thorough exposition of the facts on which the employee relied to assert pretext, and the business judgment rule was a response to the argument presented.

From May 15, 2001, through July 13, 2001, LLF had two positions with identically described responsibilities for management of the research and development function, the Director of Technical Services and the Manager of Research and Development. If the issue of pretext raised by Johal were whether an inference of pretext could be drawn from the elimination of one out of those two positions, invocation of the business judgment doctrine would have been appropriate because the decision to have one rather than two persons manage the research and development function is a business decision. See *Krchnavy v. Limagrain Genetics Corporation.* 294 F 3d 871 (7th Cir. 2002) at 878. The primary issue of pretext raised by Johal, however, was whether the creation of a new position with overlapping research and development functions with the position of Manager of Research and

Development, followed almost immediately by the elimination of the original position, could evidence discriminatory intent. The business judgment doctrine does not apply because according to Johal LLF did not change its operations and continued, except for the two-month overlap from May 15 to July 13, 2001, to have a single person being in charge of research and development. The issue was whether the positions of Manager of Research and Development and Director of Technical Services were sufficiently similar to raise a question about whether one was a continuation of the other. The issue is one of interpretation and inference and not one of business choice.

The business judgment rule has relevance only in response to the facts purportedly establishing pretext and should be invoked only after presentation of the argument for pretext. The business judgment rule is frequently incanted but not always properly applied. This Court should grant certiorari to define when the business judgment rule can be properly invoked.

III. This Court should grant certiorari to resolve the conflict between the Circuits about whether the qualification element of a *prima facie* case involving the discharge of an employee should be the "legitimate expectations" test used by the First, Fourth, Seventh, and Ninth Circuits or the "objective qualifications" test used by the Third, Fifth, Sixth, Tenth, Eleventh, and DC Circuits.

The conflict among the circuits concerning the qualification element of the *prima facie* case is well developed. Six Circuits favor objective qualifications, four Circuits favor legitimate expectations, and two Circuits vacillate between the two tests. The cases cited in the Petition define the issues. Added refinement of the issue is

not required. The conflict is long standing; waiting for the Circuits to act will not resolve the issue.

The issue is recurring. The definition of the qualification element of the prima facie case arises in every claim made by a discharged employee who seeks relief pursuant to Title VII in accordance with *McDonnell Douglas v. Green supra.*

The conflict has significant impact. LLF is not correct when it asserts, "It makes little to no difference what test a court follows because in the end the court invariably will engage in a pretext analysis, making the difference in the prima facie case analysis essentially meaningless." (Brief in Opposition p.18). Cases do address the qualification issue of the *prima facie* case and then stop without proceeding to pretext. See *Coco v. Elmwood Care Inc.* 128 F. 3d 1177 (7th Cir. 1997) at 1180, *Cengr v. Fusibond Piping Systems, Inc.*, 135 f 3d 445 (7th Cir. 1998) at 453, *Contreras v. Suncast Corporation*, 237 F. 3d 756 (7th Cir. 2001) at 761 FN 3, and Peele *v. Country Mutual Insurance Co.*288 F 3d. 319 (7th Cir. 2002) at 332. Discharged employees who did not meet the legitimate expectations test may have had valid bases to show pretext that were never considered.

Resolving the conflict between "legitimate expectations" and "objective qualifications" in favor of "objective qualifications" will eliminate the need for litigants and the courts in circuits, which now follow the "legitimate expectations" test, to struggle with and to address the overlap between performance at the *prima facie* stage and performance at the pretext stage. The review process would be streamlined, and the focus in discharge cases would be directed toward the ultimate issue of discrimination. Resolving the qualifications conflict would end the conflict on the issue within the Second and Eight Circuits.

Many states have adopted the rationale of *McDonnell Douglas v. Green* for the operation of their own employment discrimination statutes. The same conflict between "legitimate expectations" and "objective qualifications"

exists among the states. Resolution of the conflict by this Court would provide guidance for the state courts.

The flexibility envisioned by *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 98 S. Ct. 2943, 57 L. Ed. 2d. 957 (1978) relates to adaptation of the *McDonnell Douglas v. Green prima facie* case to differing fact patterns and not to authorizing the same fact pattern to be treated inconsistently in different circuits.

Gerth v. Sears Roebuck & Co., 94 F. 3d 644 (1996) was an action based upon the Kentucky discrimination statute with federal jurisdiction based upon diversity of citizenship. The issue of conflicts between circuits in the interpretation of the qualification requirement would not have arisen because a state statute was involved. The denial of certiorari in *Gerth*, 519 U.S. 1092 (1997) would have no bearing upon the cert worthiness of this case.

This Court can consider one of the arguments presented (pretext, qualifications, or statistics) without consideration of the others. *O'Connor v. Consolidated Coin Caterers Corporation*, 517 U.S. 308, 116 S. Ct. 1307 (1996) shows that this Court will grant certiorari on one issue in an employment discrimination case while declining to review an alternate ground (prima facie case qualification).

CONCLUSION

For reasons stated in the Petition and herein, Petitioner respectfully requests that this Court grant a Writ of Certiorari to review the Judgment of the Seventh Circuit Court of Appeals.

Respectfully submitted
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